Supreme Court, U.S.
FILED
JAN 25 2001
OFFICE OF THE CLERK

(2)

No. 00-1118

IN THE

Supreme Court of the United States

VINCENT RENZI, *ET AL.*,

Petitioners,

v.

CONNELLY SCHOOL OF THE HOLY CHILD, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

WILLIAM K. WILBURN
SARA BEIRO FARABOW
SEYFARTH SHAW
815 CONNECTICUT AVE., N.W.
WASHINGTON, D.C. 20006
(202) 463-2400

*Counsel of Record

JOHN G. ROBERTS, JR.*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 THIRTEENTH STREET, N.W.
WASHINGTON, D.C. 20004
(202) 637-5810

Counsel for Respondent

27PP

QUESTION PRESENTED

Whether the court below correctly applied to the particular facts before it the analytic approach for assessing legislative accommodation for religious exercise set forth by this Court in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987).

RULE 29.6 STATEMENT

Respondent Connelly School of the Holy Child, Inc., is owned and operated by the Society of the Holy Child Jesus, Inc., a religious order operated under the auspices of the Roman Catholic Church. It has no other parent organizations and no subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	6
I. THERE IS NO CONFLICT WITH THIS COURT'S CASES	6
II. THERE IS NO CONFLICT IN THE LOWER COURTS	13
III. INTERVENING LEGISLATION MAKES THIS CASE AN ILL-SUITED VEHICLE FOR CERTIORARI	17
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES:

Board of Educ. of Kiryas Joel Village Sch. Dist. v. *Grumet*, 512 U.S. 687 (1994) 6, 14

Bowen v. *Kendrick*, 487 U.S. 589 (1988) 10

Boyajian v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000), *cert. denied*, 69 U.S.L.W. 3455 (Jan. 8, 2001) 8, 14-15

Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) 10

Children's Healthcare Is A Legal Duty, Inc. v. *Min de Parle*, 212 F.3d 1084 (8th Cir. 2000), *pet. for cert. filed*, 69 U.S.L.W. 3410 (Nov. 27, 2000), No. 00-914 15-16

Cohen v. *City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994) 12, 13

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327 (1987) ..... *passim*

East Bay Asian Local Dev. Corp. v. *State*, 102 Cal. Rptr. 2d 280 (Cal. 2000) 15

Employment Div., Dep't of Human Res. v. *Smith*, 494 U.S. 872 (1990) 6

FW/PBS, Inc. v. *Dallas*, 493 U.S. 215 (1990) 17

Hobbie v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) 6

Lamb's Chapel v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) 14

Lemon v. *Kurtzman*, 402 U.S. 602 (1971) 14, 16

TABLE OF AUTHORITIES—Continued

Page

CASES:

Los Angeles Police Dep't v. *United Reported Publ'g Corp.*, 528 U.S. 32 (1999) 5, 9-10

Lynch v. *Donnelly*, 465 U.S. 668 (1984) 6-7

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 11

Seling v. *Young*, No. 99-1185 (U.S. Jan. 17, 2001) 10

Texas Monthly, Inc. v. *Bullock*, 489 U.S. 1 (1989) 9

United States Railroad Retirement Bd. v. *Fritz*, 449 U.S. 166 (1980) 14

Wallace v. *Jaffree*, 472 U.S. 38 (1985) 14

CONSTITUTION:

U.S. Const. amend. I 1, 2

STATUTES:

Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000) 8, 17

42 U.S.C. § 2000cc(a)(1)(A) 17-18

42 U.S.C. § 2000cc(a)(1)(B) 17-18

42 U.S.C. § 2000cc-2(a) 18

42 U.S.C. § 2000cc-3(e) 18

42 U.S.C. § 2000cc-3(g) 18

42 U.S.C. § 2000cc-5(5) 18

42 U.S.C. § 2000cc-5(7)(B) 18

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

Montgomery County Zoning Ordinances

§ 59-G-1.3(a) 3

§ 59-G-2.19 3

§ 59-G-2.19(a)(4) 4

§ 59-G-2.19(c) 7, 11, 12

RULE:

S. Ct. Rule 10 ..... 6, 7, 13

LEGISLATIVE MATERIALS:

146 Cong. Rec. S6688 (July 27, 2000) 18

146 Cong. Rec. S6690 (July 27, 2000) 18

146 Cong. Rec. S7774-75 (July 27, 2000) 8-9, 18

OTHER AUTHORITIES:

Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. Davis L. Rev. 725 (1999) 8

Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755 (1999) 8

Helen M. Maher, *Religious Freedom and Zoning*, 5 Buff. Envtl. L.J. 309 (1998) 8

IN THE

Supreme Court of the United States

No. 00-1118

VINCENT RENZI, *ET AL.*,

Petitioners,

v.

CONNELLY SCHOOL OF THE HOLY CHILD, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

This litigation concerns an effort by a religious school to undertake a construction project determined to be necessary to the religious mission of the school. The project involves the replacement of an old building and two temporary trailers with a new building. The new building would be fully subject to local zoning and building code requirements, but an exemption under local law for schools on premises owned by a religious organization allowed the school to forego the "special exception" process that would otherwise be required before it could undertake the project. One neighboring couple challenged the exemption as a violation of the Establishment Clause. The Fourth Circuit rejected that contention, and the present petition followed.

The petition should be denied. The decision below does not conflict with any of this Court's precedents. As the Court of Appeals explained, it "plow[ed] no new ground" in concluding that the provision at issue was a legitimate effort to accommodate religious exercise. Pet. App. 17a. Nor does the decision below conflict with any other court of appeals or state court decision. Indeed, the section of the petition purporting to describe such a conflict cites only decisions that came out the *same way* as the decision below—upholding a legislative accommodation of religious exercise in the face of an Establishment Clause challenge. *See* Pet. 18-23. Petitioners make much of the dissent below, but—as they neglect to mention—the dissenting judge expressly "agree[d] with the analytical approach taken by the majority," and disagreed only with "where they have drawn the line in this case." Pet. App. 17a. Such disagreement over a purported "misapplication of a properly stated rule of law" is not grounds for granting certiorari. S. Ct. Rule 10.

As they did below, petitioners focus their claim before this Court not on their own factual situation but on the hypothetical application of the statute to others in a quite different factual context. *See* Pet. 3, 4, 9, 10-11. The court below held that petitioners lack standing to raise such claims, Pet. App. 12a-13a—a ruling petitioners do not even address in their petition—and that the hypothetical applications on which petitioners rely were only "remote" possibilities in any event. *Id.* 13a. Petitioners also raise contentions before this Court that were not raised below, and totally neglect to mention that Congress recently enacted comprehensive legislation addressing the questions presented. The Court this very month denied a petition that the petitioners here acknowledge raised questions "largely similar" to their own, Pet. 19 n.7, and this petition should meet the same fate.

STATEMENT OF THE CASE

In an apparent effort to minimize the burden on the exercise of religion that the exemption at issue legitimately alleviates, the petition does not accurately convey the intrusiveness of the special exception process to which religiously-affiliated schools would otherwise be subject in the absence of the exemption. That process entails:

- The submission of detailed plans by the school to the County Board of Appeals;
- Public hearings at which residents or other interested members of the public may appear and testify concerning the school's plans;
- A supermajority vote of four of the five Board members finding that a variety of subjective criteria have been satisfied before the plans can be approved;
- The imposition of what petitioners themselves describe as "numerous restrictions on the special exception applicant," Ct. App. J.A. 11 (Complaint ¶ 9); and
- Annual inspections by County officials to check for compliance with such restrictions. [*See* Zoning Ordinance § 59-G-2.19, 1.3(a); Pet. App. 4a-5a.]

An appreciation of the scope and intrusiveness of the special exception process—not adequately conveyed by the petition's statement of facts—is essential to understand the conclusion of the court below that the challenged exemption from that process "spares Connelly School from the rigorous review of numerous subjective factors that otherwise could interfere with implementation of its mission," "relieves Connelly School from having to justify its religious or religion-related needs before civil authorities and convince those authorities that the school's renovations and additions satisfy * * * subjective requirements," and "extricates Montgomery County from the resolution of disputes that could have a religious underpinning." Pet. App. 11a.

At the same time, the petition exaggerates the potential impact of the exemption on others by failing to note that while it exempts religiously-affiliated schools from the special exception regime, it does not relieve them from other requirements of the Montgomery County code. This includes zoning and building code requirements concerning such matters as building height, parking, areage, frontage, and setback, as well as environmental, water and sewage, signage, fire, safety, and health regulations. *See* Ordinance § 59-G-2.19(a)(4); Ct. App. J.A. 519. Petitioners' contention that "the exemption allows the School to construct a very large building that would significantly change the character of the neighborhood," Pet. 5, like the district court's concern that the School could "construct a high-rise building," Pet. App. 33a, is thus wholly unfounded. The height of the new building (43 feet) is comfortably under the 50-foot height limit that applies to all buildings in the neighborhood, Ct. App. J.A. 551, and the architectural "footprint" of the building on the ten-acre site is only 10,000 square feet. *Id.* at 753, 755.

The petition also misstates the manner in which the School has in fact proceeded in this case. The record is clear that the School has acted throughout with sensitivity to the concerns of its neighbors: it initiated consultation meetings with the neighbors, replaced its initial architect when that architect's proposals were determined to be out of character with the neighborhood, agreed to add more landscaping and to alter the design of the parking lot lighting in response to neighbors' suggestions, and retained a traffic engineering consultant to ensure minimal impact on traffic flow. *Id.* at 550, 553, 755-757. The record thus refutes the petition's claim—made without citation—that the School "refused to make any changes to its construction plans in response to the neighbors' concerns." Pet. 5. In that regard, it is noteworthy that the present litigation was brought only by one neighboring couple.

The petition's description of the decision below is also deficient in two significant respects. First, the petition neglects even to mention that the Court of Appeals concluded that the Renzis lacked standing to complain about the possibility that the exemption might be invoked by a secular entity operating on land owned by a religious group—the same hypothetical featured in their petition before this Court. *See* Pet. 3, 4, 9, 10-11. As the Court of Appeals noted, the Renzis' argument was based upon "conjur[ing] up hypotheticals involving use of the exemption by secular entities * * * that operate on land owned by a church." Pet. App. 12a. The problem with this line of attack, as the court below pointed out, is that there is no dispute that the hypotheticals do not remotely describe the present situation—"we do not have before us any of the hypothetical situations advanced by the Renzis." *Id.* 12a-13a.

This is significant because petitioners' "standing derives from their status as neighbors challenging the particular improvements and additions being constructed by * * * a religious school operated on property owned by a religious organization." *Id.* 13a. And, as the court below explained, "[t]he 'traditional rule' is that one 'to whom a statute may constitutionally be applied may not challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.' " *Id.* (quoting *Los Angeles Police Dep't* v. *United Reported Publ'g Corp.*, 528 U.S. 32, 38 (1999)).

Petitioners simply do not address this independent and alternative ground on which the court below rejected their central argument. *See* Pet. App. 12a (finding that petitioners' "argument fails on two levels"). They do not even note it in their description of the decision below. *See* Pet. 7-9.

The second significant respect in which petitioners' description of the opinions below is deficient is in their description of the dissent. Though they quote much of it,

petitioners leave out what for certiorari purposes is the most pertinent part: the dissenting judge's statement at the outset of his opinion that "I *agree* with the analytical approach taken by the majority," disagreeing only "with where they have drawn the line in this case." *Id.* 17a (Murnaghan, J., dissenting) (emphasis added). In other words, the dissent's disagreement is over application to the particular facts of an agreed-upon analytical approach. This Court's rules make clear that such disagreement is not a basis for certiorari. *See* S. Ct. Rule 10.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH THIS COURT'S CASES.

1. Petitioners begin their argument by contending that the decision below conflicts with this Court's decisions governing accommodation of religious exercise. They are quite wrong. As this Court has emphasized, "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 334 (1987) (quotation omitted). Indeed, the Court has taken pains to emphasize that "the Constitution allows the State to accommodate religious needs by alleviating special burdens" on religion. *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705 (1994). *See Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 890 (1990) ("nondiscriminatory religious-practice exemption[s]" from generally applicable laws are not only "permitted" but often "desirable"); *Amos*, 483 U.S. at 334 (" 'This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.' ") (quoting *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987)); *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) ("[T]he Con-

stitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions * * * . Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause.") (citations and quotations omitted).

Although petitioners allege that the decision below conflicts with this Court's cases, they recognize that "under appropriate circumstances exemptions for religious practices from laws that impose serious burdens on those practices * * * are desirable and ought to be encouraged," and that "this Court's precedents authorize religious exemptions * * * where the exemption * * * alleviates a significant burden on religious exercise." Pet. 29, 13. That is precisely the governing test articulated and applied by the Court of Appeals below. *See, e.g.*, Pet. App. 11a (noting this Court's holding in *Amos* that "the exemption served a permissible secular purpose because it 'alleviate[d] significant governmental interference with the ability of religious organizations to define and carry out their religious missions,' " and concluding that "[t]his same reasoning applies to the exemption contained in Zoning Ordinance § 59-G-2.19(c)") (quoting *Amos*, 483 U.S. at 335). Petitioners' disagreement, therefore, is with the application by the court below of the test set forth by this Court in *Amos*, not with the test or approach adopted by the lower court. *See* Pet. App. 17a (noting that the conclusion that the exemption is constitutional "follows ineluctably from the holding[] in *Amos*"); *see also id.* (Murnaghan, J., dissenting) ("I agree with the analytical approach taken by the majority").

This Court's rules make clear that such disagreement does not warrant granting the writ. *See* S. Ct. Rule 10 ("A petition for certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."). At bottom, petitioners' objection is that the burden on religious exercise alleviated by the exemption is not properly regarded as significant in this particular instance.

The court below, however, detailed at some length how the "rigorous" and "subjective" special exception process to which the school would otherwise be subjected would constitute a significant burden on the religious mission of the school. Pet. App. 11a.

More generally, the extent to which application of land use regulations to religiously-affiliated entities can impede religious exercise has been amply documented.[1] The seriousness of the problem led Congress to pass the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000), to address "frequently occurring burdens on religious liberty" in the land use context. 146 Cong. Rec. S7774 (July 27, 2000) (Joint Statement of Sens. Hatch and Kennedy). The Act was based on "three years of hearings" that "compiled massive evidence that [the] right [to build, buy, or rent space for religious assembly] is frequently violated" and "much

---

[1] *See, e.g.*, *Boyajian* v. *Gatzunis*, 212 F.3d 1, 8 (1st Cir. 2000) (citing evidence of "numerous instances of zoning actions that reflect local sentiments ranging from outright hostility to indifference to the needs of religious organizations"), *cert. denied*, 69 U.S.L.W. 3455 (Jan. 8, 2001); Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. Davis L. Rev. 725, 726, 731 (1999) (study documenting that "religions are significantly disadvantaged in seeking land use accommodations as they deal with so called 'generally applicable' and 'neutral' laws" and that "ignorance and even hostility toward religion sometimes operate behind the facade of ostensibly neutral land use regulations"); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 783 (1999) ("Land use regulation has become the most widespread obstacle to the free exercise of religion."); Helen M. Maher, *Religious Freedom and Zoning*, 5 Buff. Envtl. L.J. 309, 310 (1998) ("The conflict between religious freedom and government regulation is often witnessed in the clash between religious uses of property and zoning ordinances that regulate those property uses").

evidence that * * * [religious] discrimination [in land use regulation is] very widespread." *Id.* at S7774-75. *See infra* 17-19. Petitioners may disagree with the lower court's finding that the exemption served the legitimate purpose of alleviating a *significant* burden on the religious mission of the Connelly School, Pet. App. 11a, but that conclusion was amply supported, and any such disagreement plainly does not warrant certiorari.

The petition relies most heavily on the plurality opinion in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), and criticizes the Court of Appeals' opinion below for neither discussing nor citing that opinion. Pet. 16. Not even the dissent below cited *Texas Monthly*, however, for the simple reason that the case offers no support for petitioners' contentions.

As respondent explained below, the tax exemption for religious periodicals in *Texas Monthly* differed in at least two critical respects from the regulatory exemption at issue here and in *Amos*: *first*, it required nonbeneficiaries to subsidize religion, "increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications;" *second*, it did not "prevent[] potentially serious encroachments on protected religious freedoms." *Texas Monthly*, 489 U.S. at 18 n.8. As the plurality in *Texas Monthly* confirmed, that decision "in no way" signaled a departure from *Amos*. *Id.*

2. As noted, the core of petitioners' objection is a complaint that the court below concluded they had no standing to raise. Pet. App. 13a. Petitioners' argument that the exemption at issue does not relieve a significant burden on religious exercise depends upon the hypothetical possibility that it might be applied in the case of a secular school, so that the exemption is a "naked preference for religious landlords over nonreligious landlords." Pet. 11. As the court below explained, no such hypothetical case was before the court, and

the " 'traditional rule' is that one 'to whom a statute may constitutionally be applied may not challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.' " Pet. App. 13a (quoting *Los Angeles Police Dep't*, 528 U.S. at 38).

The application of this "traditional rule" in this case precludes consideration of the central complaint the Renzis raised below and seek to bring before this Court. Although petitioners went so far as to argue below that "the actual use of the exemption today is irrelevant," Ct. App. Br. 46, this Court has explained that the rule it reiterated as recently as *Los Angeles Police Department* "reflects * * * the prudential limitations on constitutional adjudication," and limits judicial review to "flesh and blood legal problems." *Los Angeles Police Dep't*, 528 U.S. at 39 (quotations omitted). *See Seling* v. *Young*, S. Ct. No. 99-1185, slip op. at 13 (Jan. 17, 2001) (court of appeals "addressed only respondent's individual case, and we do not decide claims that are not presented by the decision below"); *Bowen* v. *Kendrick*, 487 U.S. 589, 612 (1988) ("It has not been the Court's practice * * * to strike [statutes] down in anticipation that particular applications may result in unconstitutional results"); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) ("two of the cardinal rules governing the federal courts" are "never to anticipate a question of constitutional law in advance of the necessity of deciding it" and "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (quotation omitted).

This Court would not be able to address petitioners' central argument on the merits without first addressing and overturning the ruling below that petitioners are not suitable parties to raise that argument. Yet petitioners make no effort to respond to the Court of Appeals' ruling in that regard, do not include a "Question Presented" addressing that ruling, and do not suggest that anything about that ruling is remotely certworthy.

The court below went on to explain that "the possibility that the exemption would be applied in a completely areligious setting is remote." Pet. App. 13a.[2] Indeed, petitioners' contention that the exemption was enacted simply to benefit "religious landowners" is seriously undercut by the fact that the exemption is only given to churches or religious organizations that allow their buildings or premises to be used for *education*. If the County in fact acted out of the "religious favoritism" plaintiffs have attributed to it, it surely would have established a much broader exception—one exempting religious landowners from zoning controls for any number of uses, including commercial uses. Instead, the County did what makes perfect sense if it were seeking to avoid government interference with the exercise of religion—carved out an exemption for churches and religious organizations using their property for education.

One of the oldest and most traditional ways in which religious groups—including the Roman Catholic Church—have pursued their mission is through education. In light of this tradition and practice, it would have been perfectly understandable for the County to presume that a "private educational institution, or parochial school, * * * located in a building or on premises owned or leased by any church or religious organization"—the language of the exemption—would share and promote the religious mission of the religious owner. *See Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) ("We need not leave our common sense at the doorstep when we interpret a statute.").

The fact that Section 59-G-2.19(c) *conceivably* might extend to a secular school located on property controlled by a

---

[2] A typographical error in petitioners' appendix and the Federal Reporter—or an over-zealous spell-check program—changes "areligious" to "religious" in this quotation. It is "areligious" in the slip opinion issued by the Fourth Circuit, which is plainly correct in context.

church or religious organization does not establish an improper purpose. Petitioners offer no evidence that the exemption was intended to cover the implausible types of schools they have hypothesized, *see* Ct. App. Br. 6-7, and, as discussed, it was perfectly reasonable for the County to assume that all (or virtually all) the schools covered by Section 59-G-2.19(c) would share the same religious mission as the church or other religious institution controlling the premises on which they are located. Indeed, even the District Court recognized this would be true in the "vast majority of cases." Pet. App. 28a. [3]

Moreover, if the County *had* stopped to think about the exemption's *potential* application to a secular school, it might well have recognized that remedying the alleged drafting flaw asserted by plaintiffs—*i.e.*, that the exemption does not specifically "require that a school be religiously-affiliated," Ct. App. Br. 13—would create more Establishment Clause problems than it would solve. *Cohen* v. *City of Des Plaines*, 8 F.3d 484, 490 (7th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994), illustrates the point. Like plaintiffs here, the plaintiff in that case "challenge[d]" the City's asserted accommodation purpose for the exemption, arguing

---

[3] While a common sense construction is all that is needed to reach the conclusion that schools seeking the exemption are far more likely to resemble the religious school defendant in this case than the hypotheticals conjured up by plaintiffs, the record also supports this conclusion. *See* Ct. App. J.A. 519-520. In any event, to be clear, even if there existed in Montgomery County a secular school (or even handful of schools) located on religious property that might fall within the literal reach of the exemption *and* be allowed to invoke the exemption by the County—issues not presented on the facts of this case—any such school would obviously be the exception to the rule. And construing the exemption in light of that hypothetical exception would not only defy common sense but flout the "traditional rule" of constitutional adjudication. *See supra* 9-10.

that the " 'City's exemption applies to all day care centers in church buildings regardless of whether they teach religion at all.' " *Id.* at 490 (quoting district court). The Seventh Circuit rejected this argument:

> [W]e are wary of holding that the Des Plaines' ordinance would pass muster under *Lemon*'s purpose requirement only if it stated that nursery school and day care center activities must be "religious" in nature. * * * [I]t is not up to legislatures (or to courts for that matter) to say what activities are sufficiently "religious." Any legislative or judicial attempt at such a definition would surely fail. Worse, it would almost certainly undercut the neutral posture required of every branch of government under the Establishment Clause. [*Id.*]

The court below adopted this reasoning, Pet. App. 13a-14a, quoting *Amos* for the proposition that "it is a significant burden on a religious organization to require it * * * to predict which of its activities a secular court will consider religious." *Id.* 14a (quoting 483 U.S. at 336).

II. THERE IS NO CONFLICT IN THE LOWER COURTS.

1. Although petitioners allege a conflict among the lower courts, it is remarkable that each of the cases they discuss actually came out the same way as the decision below—holding that the particular legislative accommodation of religious exercise at issue did not violate the Establishment Clause. Pet. 18-23. Petitioners make much of the fact that there were dissents in those cases, but the criteria for certiorari speak of a conflict between decisions of courts of appeals or state courts of last resort, not disagreement within particular panels. *See* S. Ct. Rule 10. The lower courts are in fact completely in accord in following the approach to accommodation of religious exercise this Court articulated in *Amos*; the dissenting opinions simply confirm that the issue was carefully considered and debated before being resolved.

See United States Railroad Retirement Bd. v. *Fritz*, 449 U.S. 166, 177 n.10 (1980) ("The comments in the dissenting opinion * * * are just that: comments in a dissenting opinion.").

Recognizing that the cases on which they rely for a purported conflict among the lower courts all come out the same way, petitioners assert that what matters is not "which side was correct," but rather that serious questions are arising "over the principles that govern, or should govern, religious accommodation." Pet. 21. Not so. Just as the dissent agreed with the majority's analytic approach below, and only disagreed over "where they have drawn the line in this case," Pet. App. 17a, so too in the cases on which petitioners rely. In those cases as well there was little debate "over the principles that govern * * * religious accommodation," and only disagreement over application of those principles to particular facts.[4]

Thus, for example, in *Boyajian* v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000), *cert. denied*, 69 U.S.L.W. 3455 (Jan. 8, 2001), the First Circuit, like the court below, recognized that a legislative decision "to give religion an assist in the local land-use

---

[4] In an effort to latch onto any plausible conflict—regardless of whether it is implicated in this case—petitioners suggest that this case is "an appropriate vehicle for resolving the recurring debate over *Lemon*'s general viability." Pet. 21. Petitioners have always argued strenuously in *favor* of applying that test in this case, *see, e.g.*, Ct. App. Br. 10-11; J.A. 170, and those Justices who have suggested modifying the test have argued in favor of affording broader scope for government to legislate without running afoul of the Establishment Clause. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 750 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment, joined by Thomas, J.); *Wallace* v. *Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). Any reconsideration of *Lemon* along those lines would certainly not benefit petitioners.

planning process is consistent with the Supreme Court's holding in *Amos* that legislation isolating religious groups for special treatment is permissible when done for the 'proper purpose' of alleviating a burden on the exercise of religion." *Id.* at 8 (citing *Amos*, 483 U.S. at 337-338). The First Circuit noted that this was particularly true given the extensive evidence of "discrimination against religion in the land use context." *Id.*

Petitioners make much of the dissent in *Boyajian*, Pet. 19, but neglect to mention that the dissenting judge—like the dissenter here—began by noting his *agreement* with the majority's articulation of the applicable legal standards:

> I am largely in agreement with the majority as to the legal standards which—fuzzy as they may be—apply to this case. However, my *application* of those standards leads me to a different result than that reached by the majority. [212 F.3d at 11 (Torruella, C. J., dissenting) (emphasis added).]

As already noted, such disagreement over the application of a standard to particular facts is not a basis for certiorari. S. Ct. Rule 10. [5]

Neither the majority nor the dissent in the Eighth Circuit decision cited by petitioners, *Children's Healthcare Is A Legal Duty, Inc.* v. *Min de Parle*, 212 F.3d 1084 (8th Cir. 2000), *pet. for cert. filed*, 69 U.S.L.W. 3410 (Nov. 27, 2000), No. 00-914, conflicts with the decision below. Both the majority and dissent—like the court below—applied *Amos* and recognized that "the alleviation of a special, government-created burden on religious belief and practice constitutes a

---

[5] Petitioners recognized that the petition for certiorari in *Boyajian* presented questions "largely similar to those presented here." Pet. 19 n.7. This Court denied that petition without recorded dissent on January 8, 2001—the same day the present petition was filed. 69 U.S.L.W. 3455.

valid secular purpose under *Lemon*," *id.* at 1093 (majority), and that "the accommodation of religion, *i.e.*, the alleviation of significant governmental interference with the exercise of religion, can constitute a permissive secular purpose." *Id.* at 1104 (dissent).

There is of course no conflict with *East Bay Asian Local Dev. Corp.* v. *State*, 102 Cal. Rptr. 2d 280 (Cal. 2000). The court in that case expressly relied upon the opinion below. *Id.* at 297-298 (finding that the Fourth Circuit opinion in *Renzi* "supports our conclusion"). The petition invokes Justice Mosk's dissent in *East Bay Asian*, Pet. 20, without noting that it was based on the California state constitution. *See* 102 Cal. Rptr. 2d at 302 ("Our state constitutional law is analytically distinct and more protective of the principle of church-state separation than the First Amendment.") (Mosk, J., dissenting); *id.* at 304 (dissent's conclusion based on state constitutional provisions) (same). The other dissenting opinion in *East Bay Asian* specifically recognized that "government may target help to religious individuals and groups, in the form of relief from the burdens of generally applicable legislation, when application of the general law would significantly impair the person's or group's free exercise of religion." *Id.* at 305 (Werdegar, J., dissenting) (citing, *inter alia*, *Amos*, 483 U.S. at 334-336). That is, of course, the proposition on which the court below relied. Justice Werdegar agreed with the dissent below that there was a "lack of a showing of significant burden" in our case, *id.* at 321 n.12, but—as explained—such disagreement over application of the *Amos* standard is certainly not grounds for certiorari, particularly coming in a dissent rather than a court holding.

2. Petitioners posit another conflict purportedly implicated by the decision below, over whether the burdens an exemption imposes on third parties should be considered in assessing the constitutionality of an accommodation of religion. Pet. 23-25. That issue is not properly before this

Court because it was not raised below. *See* Pet. App. 6a (reviewing arguments raised by the Renzis); *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below."). Petitioners argued in favor of applying the *Lemon* test in assessing the exemption at issue, and never pointed to any purported burden on third parties as part of the application of that test. *See* Ct. App. Br. 10-11. It is too late to raise that issue for the first time in a petition for certiorari.

In any event, the issue is a red herring. We are dealing with legislative accommodations of religion. So long as the accommodation passes constitutional muster, the weighing of respective burdens in deciding whether to adopt the accommodation is a matter for the legislative body, just as it is in any other case of legislation.

III. INTERVENING LEGISLATION MAKES THIS CASE AN ILL-SUITED VEHICLE FOR CERTIORARI.

Even if the questions presented by the petition met this Court's customary criteria for certiorari, this case would be a particularly ill-suited vehicle for considering those issues. On September 22, 2000—shortly after the Court of Appeals issued its decision in this case—Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq.*). That Act specifically addresses the effect of land use regulations on religious exercise and prohibits regulations imposing the very burdens that would be placed on respondent by subjecting it to the special exception procedure involved in this case.

The Act broadly proscribes any government—federal, state, or local—from "impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution," unless the government demonstrates

that such burden (1) "is in furtherance of a compelling governmental interest[,]" and (2) "is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000cc(a)(1)(A), (B). "Land use regulation" is defined as "a zoning or landmarking law * * * that limits or restricts a [person's] use or development of land," if the person has an "ownership, leasehold * * * or other property interest in the regulated land." *Id.* § 2000cc-5(5). "Religious exercise" specifically includes "[t]he use, building, or conversion of real property for the purpose of religious exercise." *Id.* § 2000cc-5(7)(B). The Act provides that it "shall be construed in favor of a broad protection of religious exercise," *id.* § 2000cc-3(g), and creates a private right of action and defense in favor of aggrieved persons. *Id.* § 2000cc-2(a). The Act also specifically contemplates exemptions such as the one at issue here, providing that "[a] government may avoid the preemptive force of [the] Act * * * by providing exemptions from [a] policy or practice for applications that substantially burden religious exercise." *Id.* § 2000cc-3(e).

This legislation not only validates the reasoning of the Court of Appeals below, but provides an independent basis for upholding the exemption at issue here. As the Court of Appeals concluded, exempting respondent from the special exception procedure "lifts a burden from the school's exercise of religion." Pet. App. 14a. That burden is substantial. As the court further observed, the special exception procedure would subject respondent to "the rigorous review of numerous subjective factors that otherwise could interfere with the implementation of its mission" and force respondent "to justify its religious or religion-related needs before civil authorities." *Id.* 11a. Protecting religious institutions from such interference is one of the core concerns underlying the Act. *See* 146 Cong. Rec. S6688, S6690, S7774 (July 27, 2000). Petitioners have not identified any "compelling governmental interest" that could be served by the imposition of such a substantial burden on religious exercise.

The intervening passage of the Act—providing an independent basis for upholding the exemption—is an additional reason to deny certiorari. The Act answers petitioners' contention that "legislatures, county commissions and town councils across the nation" have a "need for clear rules governing religious accommodations in situations such as these." Pet. 28-29. The Act provides clear rules. The exemption in this case is indisputably consistent with the Act. Any consideration of constitutional issues in this area by this Court—if necessary—should take place in the context of application of the Act.

* * * *

In sum, the petition presents for review a case in which:

- There is no conflict among the lower courts;
- The majority below "plow[ed] no new ground" and even the dissent "agree[d] with the analytical approach taken by the majority," Pet. App. 17a;
- The main objection petitioners raise concerns the "remote" possibility that the statute might hypothetically be applied to others in a very different factual context, *id.* 13a;
- An alternative holding unaddressed by petitioners bars consideration of their central complaint;
- Congress has addressed the questions presented in comprehensive legislation enacted after the decision below;
- Some arguments in the petition were never raised below; and
- The Court within the past month denied a petition that petitioners themselves contend presented issues "largely similar" to their own. Pet. 19 n.7.

It is difficult to imagine a less attractive candidate for certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM K. WILBURN
SARA BEIRO FARABOW
SEYFARTH SHAW
815 CONNECTICUT AVE., N.W.
WASHINGTON, D.C. 20006
(202) 463-2400

*Counsel of Record

JOHN G. ROBERTS, JR.*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 THIRTEENTH STREET, N.W.
WASHINGTON, D.C. 20004
(202) 637-5810

Counsel for Respondent